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IN THE

Supreme Court of the United States

Term 1971

No. 71-564

DISTRICT OF COLUMBIA,

Petitioner,

v.

MELVIN CARTER,

Respondent.

On Writ of Certiorari to The United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENT

SUMMARY OF ARGUMENT

In reversing the District Court's dismissal of the plaintiff's claim against the District of Columbia under 42 U.S.C. §1983, the Circuit Court distinguished this Court's holding in *Monroe v. Pape*, 365 U.S. 167 (1961) on the grounds that (a) the *Monroe* rationale is inapplicable to municipalities which can be sued under local law and (b) that the District of Columbia, as a creation of Congress, is uniquely

within the power of Congress to regulate, and the problems of federalism arising from the imposition of liability on state political subdivisions are therefore irrelevant.

While agreeing that *Monroe* may be thus distinguished, respondent nevertheless urges that it is appropriate to re-examine the *Monroe* holding, and the legislative history on which it rests.

Close analysis of the legislative history of § 1983 does not support the conclusion reached in *Monroe* that municipal corporations are not "persons" within the meaning of that section. The Sherman Amendment debates, which were the sole legislative history relied upon, were concerned only with municipal liability for riot damage and had nothing whatever to do with the question of whether municipalities should be liable, either directly or vicariously, for constitutional deprivations by municipal officials.

In the decade since *Monroe*, its broad holding excluding cities from coverage under § 1983 has been the subject of growing criticism among legal commentators and widespread circumvention by various lower courts, and – at least implicitly – by this Court. The viability of the *Monroe* holding has been substantially eroded by the several circuits which have sought to implement the objectives of the Civil Rights Act by awarding equitable relief under § 1983 against cities and other state subdivisions, even where such equitable relief has carried substantial monetary consequences.

The concept of municipal immunity has been widely discredited in recent years and runs counter to the notions of equal protection and due process. Immunity for police misconduct is particularly insupportable since it is only through municipal liability that the twin objectives of deterrence of unconstitutional behavior and compensation for

its occurrence can realistically be achieved. Relevant studies have found that police misconduct, with attendant deprivation of constitutional rights, continues to be a serious problem in the United States, and existing mechanisms and procedures for coping with the problem have proved inadequate. Thus, urgent and compelling considerations of public policy afford further grounds for a reconsideration of *Monroe.*

Should the Court decline to re-examine its holding in *Monroe* at this time, the decision of the Circuit Court should nevertheless be affirmed. The legislative history of the Sherman Amendment, upon which this Court's decision was predicated, makes it clear that the primary concern of the opponents of that Amendment was the fear of imposing liability on state entities which were not financially equipped to cope with such liability – a consideration plainly inapplicable to cities whose immunity has been abrogated under local law. Further support for incorporation of local law abrogating immunity is found in 42 U.S.C. § 1988, which operates to "borrow" local state law where necessary to effectuate the purposes of the Civil Rights Act. Under local law, the District of Columbia may be held liable in damages, either directly or vicariously, for injuries arising from the tortious conduct of its police officers.

Finally, the rationale of the Sherman Amendment opposition is inapplicable to the District of Columbia. The problems of federalism and encroachment upon the rights and prerogatives of the sovereign states which concerned the Congress in 1871 have no relevance to the District of Columbia, which is itself a creature of Congress, and over whose finances and other affairs Congress exercises primary authority. The uniqueness of the District's position is further shown in the fact that the same Congress which enacted § 1983 had, less than two months earlier, constituted

the District of Columbia as a corporate body which could sue and be sued.

I. *MONROE v. PAPE*, INSOFAR AS IT HOLDS THAT A CITY IS NOT A PERSON WITHIN THE MEANING OF § 1983, SHOULD BE REVERSED.

A. The Legislative History of § 1983 is Entirely Consistent with the Concept of Municipal Liability for the Acts of Municipal Employees.

In *Monroe v. Pape*, 365 U.S. 167, 191 (1961) this Court held that "a municipal corporation is not a 'person' within the meaning of Section 1983." Mr. Justice Douglas rejected as merely permissive the language of another statute passed the same year which provided, under the heading "Rules for the Construction" of Acts of Congress, that "the word 'person' *may* extend and be applied to bodies politic and corporate." Act of February 25, 1871, ch. 71, § 2, 16 Stat. 431 (emphasis added).[1]

While permissive definitions usually invite such analysis, the Court explicitly stated that it did not reach the policy considerations which might be marshalled for and against municipal liability. Instead the Court relied on what it deemed to be the relevant portions of the legislative history of the Civil Rights Act. Closer anlaysis of that history does not support the Court's conclusion, but points, rather, to a contrary result.[2]

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[1] It is probable that Congress intended to include as a "person" the District of Columbia – a "body corporate" which it had created only four days earlier. See p. 48, *infra*.

[2] Kates and Kouba, "Liability of Public Entities Under Section 1983 of the Civil Rights Act," 45 S.Cal.L.Rev. 131, 134-136, 157-161 (Cont'd.)

The *Monroe* Court's analysis of legislative history focused not on debate directly relating to Section 1983, but on Congressional rejection of the Sherman Amendment to Section 1983.[3] This amendment would in certain circumstances

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Ftn. 2 (Cont'd.)
(1972); Note, "Developing Governmental Liability Under 42 U.S.C. §1983," 55 Minn.L.Rev. 1201 (1971). Comment, "Suing Public Entities Under the Civil Rights Act: *Monroe v. Pape* Reconsidered," 43 U. Colo. L. Rev. 105 (1971).

[3] *Cong. Globe*, 42nd Cong., 1st Sess. 704-705, 725, 800-801 (1871). As originally passed by the Senate, the amendment reads:

> That if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed wholly or in part, by any persons riotously and tumultuously assembled together; or if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together; and if such offense was committed to deprive any person of any right conferred upon him by the Constitution and laws of the United States, or to deter him or punish him for exercising any such right, or by reason of his race, color, or previous condition of servitude, in every such case the inhabitants of the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense if living, or to his legal representative if dead; and such compensation may be recovered by such person or his representative by a suit in any court of the United States of competent jurisdiction in the district in which the offense was committed, to be in the name of the person injured, or his legal representative, and against said county, city, or parish; and execution may be issued on a judgment rendered in such suit, and may be levied upon any property, real or personal, of any person in said county, city, or parish; and the

(Cont'd.)

have imposed damage liability, similar to the "riot liability" long known to the English law and reflected in the law of

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Ftn. 3 (Cont'd.)

> said county, city, or parish may recover the full amount of said judgment, cost, and interest from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction.

Cong. Globe, 42d Cong., 1st Sess. 704 (1871). Although amended in conference, few substantive changes were made in the first portion of the provision. In addition to adding an explicit requirement of intent and making several minor word changes, the revised Sherman Amendment contained additional language recognizing the liability of the municipality only after the judgment was not satisfied by the actual wrongdoers:

> [A]ny payment of any judgment, or part thereof, unsatisfied, recovered by the plaintiff in such action, may, if not satisfied by the individual defendant therein within two months next after the recovery of such judgment upon execution duly issued against such individual defendant in such judgment, and returned unsatisfied, in whole or in part, be enforced against such county, city, or parish, by execution, attachment, mandamus, garnishment, or any other proceeding in aid of execution or applicable to the enforcement of judgments against municipal corporations; and such judgment shall be a lien as well upon all moneys in the treasury of such county, city, or parish, as upon the other property thereof. And the court in any such action may on motion cause additional parties to be made therein prior to issue joined, to the end that justice may be done. And the said county, city, or parish may recover the full amount of such judgment, by it paid, with costs and interest, from any person or persons engaged as principal or accessory in such riot, in an action in any court of competent jurisdiction. And such county, city, or parish, so paying, shall also be abrogated to all the plaintiff's rights under such judgment.

Id. at 749.

some states, upon any city or county in which citizens or their property were injured in civil disturbances. Though twice passed in slightly different forms by the Senate, the Sherman Amendment was twice rejected by the House of Representatives, and eventually dropped. It was on the basis of the debates over the Sherman Amendment that Mr. Justice Douglas inferred that the congressional response to the proposal for municipal liability "was so antagonistic that we cannot believe that the word 'person' was used in this particular act to include them [municipalities]." 365 U.S. at 191. The proponents of the Sherman Amendment analogized it to the ancient "riot acts" of English law, under which local communities were liable for riot damage. *Cong. Globe*, 42d Cong., 1st Sess. 705, 751-52 (1871) (remarks of Sen. Sherman, Rep. Shellaburger) [hereafter cited *Cong. Globe*]. Opponents of the amendment pointed out, however, that under early English law, all members of the community were responsible to join the "hue and cry" against any wrongdoers. Since the members of the community thus had the duty, and presumably the power, to prevent and contain civil disturbances, it was reasonable to impose liability for their failure to do so. *Cong. Globe*, 788, 794 (remarks of Reps. Kerr and Poland). Under American law, the opponents pointed out, local governments enjoyed only the power conferred upon them by the state. Accordingly, in many cases municipalities simply did not have the authority to prevent the civil disturbances to which the amendment was addressed. *Cong. Globe*, 757, 762, 791, 799 (remarks of Sens. Conkling and Stevenson, Reps. Willard and Farnsworth).[4]

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[4] It was pointed out that, in fact, only the largest cities maintained regular police departments in 1871; smaller cities and towns simply did not have police forces to quell civil disturbances. *Cong. Globe* at 765 (remarks of Sen. Casserly); see, also *President's Commission on Law Enforcement: Task Force Report, The Police, The History of the Police* 5 (1967).

In effect, these critics charged, the Sherman Amendment would therefore either punish municipalities for disturbances which they had no means to prevent, or would – in derogation of the state's power to determine the authority of municipalities – compel local governments to maintain police forces. *Cong. Globe* at 765, 795 (remarks of Sen. Casserly, Rep. Blair). Accordingly, in view of the enormous potential liability for civil disturbances, opponents of the Sherman Amendment were led to dire predictions that municipalities would be bankrupted, were the amendment adopted. *Cong. Globe*, 763, 772, 799 (remarks of Sen. Casserly, Rep. Smith).

The Sherman Amendment was not designed to impose liability on a municipality for misconduct by its agents. It was aimed at imposing municipal liability for the failure to prevent or contain private acts of violence or harm. Therefore, the congressional renunciation of the Amendment meant that a community could not be liable for purely private acts, acts which it lacked a state-conferred power or duty to prevent. The fact that the Sherman Amendment talks only about damages from the actions of persons "riotously and tumultuously assembled together" suggests that the proponents of the Amendment assumed that liability for the acts of public officials was already covered by Section 1983 itself. In this regard, it is crucial to note that even the opponents of the Sherman Amendment conceded that civil liability would be appropriate when the community "has proved faithless to its duties." *Cong. Globe* at 790 (remarks of Rep. Willard).[5]

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[5] See also pp. 36-37, *infra*, particularly the quote remarks of Rep. Poland and Rep. Burchard.

B. The *Monroe* Holding Has Been Seriously Eroded by the Many Cases Granting Equitable Relief Against Cities Under § 1983.

If, as this Court stated in *Monroe*, a municipal corporation is not a "person" within the meaning of § 1983, it necessarily follows that no action – legal or equitable – may be brought against a city under that statute. The fact is, however, that in the decade since *Monroe* a growing number of lower courts have explicitly declared that actions against cities will lie under § 1983 for the obtaining of equitable relief, even where the equitable relief is accompanied by monetary awards.[6] These cases manifest a significant judicial disaffection for the *Monroe* rule by strictly limiting its application. This Court has shown no inclination to stem this tide and to give the *Monroe* holding expansive effect, although it has had opportunity to do so.

In *Adams v. City of Parkridge*, 293 F.2d 585 (1961) the Seventh Circuit expressly limited the *Monroe* holding to barring actions for damages, and enjoined under § 1983 the enforcement of a municipal ordinance limiting charitable solicitations. Similar holdings granting equitable relief against cities under § 1983 have been made by four circuit courts.[7]

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[6] Cf. Note, "A Municipal Corporation May be Sued Under the Civil Rights Act for Equitable Relief," 70 Colum. L. Rev. 1467 (1970); Comment, "Injunctive Relief Against Municipalities Under Section 1983," 119 U. Pa. L. Rev. 389 (1970).

[7] Fourth Circuit: *Garren v. City of Winston-Salem*, 439 F.2d 140 (1971);

Fifth Circuit: *Harkless v. Sweeny Independent School District*, 427 F.2d 319, *cert. den.* 400 U.S. 991 (1971); *Butts v. Dallas Independent School District*, 436 F.2d 728 (1971);

(Cont'd.)

In *Harkless v. Sweeny Indep. School District*, 427 F.2d 319 (5th Cir.) *cert. den.* 400 U.S. 991 (1971), the plaintiffs were ten Black school teachers seeking reinstatement and back pay as a result of the school district's failure to renew their contract when the school system desegregated. The district court granted the defendant's motion to dismiss, relying upon the holding in *Monroe* that a city was not a "person" within the meaning of § 1983.

On appeal, the circuit court reversed and limited the application of *Monroe* to barring damage claims under *respondeat superior* against cities. *Monroe* thus was held to impose no obstacle to claims against municipalities for equitable relief. The court went on to hold that plaintiffs, under the rubric of seeking equitable relief, could obtain back pay as well. This Court denied *certiorari*, although it is difficult to view the case as anything but a clear departure from the holding and rationale of *Monroe*.

The *Monroe* holding has been further eroded by those cases in which various non-municipal public entities have been held subject to suit under § 1983. In *Scher v. Board of Education of Town of West Orange*, 424 F.2d 741 (3rd Cir. 1970) the Board of Education was held to be potentially liable in damages, as an entity distinct from the town itself, even though the claim that this was really a suit against the city, precluded by *Monroe v. Pape*, was

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Ftn. 7 (Cont'd.)

Seventh Circuit: *Adams v. City of Parkridge, supra; Schnell v. Chicago*, 407 F.2d 1084 (1969);

Tenth Circuit; *Daily v. City of Lawton, Okalhoma*, 425 F.2d 1037 (1970).

See also, *Sims v. Jurus*, 313 F. Supp. 1212 (D. Ore. 1969); contra *Rosatto v. Wyman*, 414 F.2d 170 (2d Cir. 1969); *Diamond v. Pitchess*, 411 F.2d 565 (9th Cir. 1969); *Deane Hill Country Club v. Knowville*, 379 F.2d 321 (6th Cir. 1967).

presented to the Court. The validity of this distinction is difficult to accept, since in the instant case such a rule would have permitted a suit against the police department consequences. A similar result was achieved in *Smith v. Board of Education of Morrillton School District No. 32*, 365 F.2d 770 (1966) (opinion by Blackmun, J.), where damages were held to be recoverable against the defendant school board under § 1983.

In *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), an action under § 1983 for injunctive relief and nominal damages against the defendant school district, this Court, without reference to *Monroe*, reversed and remanded for further proceedings "expressing] no opinion on the form of relief which should be granted." 393 U.S. at 514.

C. The Doctrine of Sovereign Immunity Is an Exception-Riddled Anachronism With No Rational Basis, Whose Application Denies Due Process and Equal Protection.

It is a profound enigma of the law how a doctrine based on the maxim "The King can do no wrong" became entrenched in the judicial system of a nation whose very birth is the maxim's refutation.[8] Tracing the doctrine's development in American jurisprudence, far from

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[8] *Evans v. Board of County Comm'rs. of the County of El Paso*, 482 P.2d 968, 969 (Colo. 1971); *Hargrove v. Town of Cocoa Beach*, 96 So.2nd 130, 132 (Fla.) (1957).

> "It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds

(Cont'd.)

solving the mystery, compounds the confusion.[9] It is not surprising, therefore, that a consistent stream of scholarly criticism[10] has turned in recent years to a torrent of legislative and judicial retreat.[11]

Ftn. 8 (Cont'd.)

upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, "The Path of the Law," 10 Harv. L. Rev. 457, 469 (1897).

[9] See brief for *Amicus Curiae*, p. 21, *et seq.*, *Graves v. D.C.*, 287 A. 2nd 524 for an excellent historical analysis

[10] Price and Smith, "Municipal Tort Liability: A Continuing Enigma," 6 Fla. L. Rev. 330 (1953); Bernstein, "Governmental Tort Liability and Immunity in Wisconsin," 1961 Wisc. L. Rev. 486; Harno, "Tort Immunity of Municipal Corporations," 4 Ill. L. Q. 28 (1921); Jaffe, "Suits Against Government and Officers: Sovereign Immunity," 77 Harv. L. Rev. 1 (1963); Borchard, "Government Liability in Tort, Parts I-III," 34 Yale L.J. 1, 129, 229 (1924-25); Parts IV-VI, 36 Yale L. J. 757, 1039 (1926-1927).

[11] State and municipal immunity have in recent years been partially or wholly abrogated by statute or judicial decision in the following jurisdictions: (Cont'd.)

As between the innocent victim of a policeman's billy club and the community which puts the policeman on the street – perhaps inadequately trained or supervised – there

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Ftn. 11 (cont'd)

Alabama: *City of Foley v. Terry*, 278 Ala. 30, 175 So. 2d 461 (1965).

Alaska: Alaska Stat. §09.65.070 (1962).

Arizona: *Stone v. Arizona Highway Commission*, 93 Ariz. 384, P.2d 107 (1963).

California: *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211, 11 Cal. Reptr. 1189, 359 P.2d 457 (1961), modified *sub. nom. Corning Hospital District v. Superior Court of Tehama Co.*, 57 Cal. 2d 488, 20 Cal. Reptr. 621 370 P.2d 325 (1962); Cal. Govt Code §§815.2, 818 (1966).

Colorado: *Evans b. Board of County Comm'rs of County of El Paso*, 482 P.2d 968 (Colo. 1971).

Connecticut: *Murphy v. Ives*, 151 Conn. 259, 196 A.2d 596 (1963).

Florida: *Hargrove v. Town of Cocoa Beach*, 96 So.2d 130 (Fla. 1960).

Hawaii: Hawaii Rev. Stat. 662-1(2) (1968).

Illinois: Smith-Hurd Ill. Ann. Stat. Ch. 85 §2-109 (1965).

Indiana: *Brinkman v. City of Indianapolis*, 231 N.E. 2d 169 (1967).

Iowa: Iowa Code Annotated §§225(a)(1) - (a)(20)(1967).

Kansas: *Daniels v. Kansas Hwy. Patrol*, 206 Kan. 710, 482 P.2d 46 (1971).

Kentucky: *Haney v. Lexington*, 386 S.W.2d 738 (Ky, 1964).

Michigan: *Williams v. Detroit*, 364 Mich. 231, 111 N.W.2d L (1961).

Minnesota: Minn. Stat. §§446.01-.15 (1969).

New Jersey: *McAndrew v. Mularchuck*, 33 N.J. 172, 162 A.2d 820 (1960).

Nebraska: *Brown v. City of Omaha*, 183 Neb. 430, 160 N.W. 2d 805 (1969) Rev. Stat. Neb. §23-2409(2) (1970).

Nevada: Nev. Revised Stat. §41.031 (1968).

New York: New York Ct. Cl. Act §8 (1963).

North Carolina: N.C. Gen. Stat. §§143-291, 300.1 (1964).

Ohio: *Krause v. State*, 28 Ohio App. 2d 1, 274 N.E. 2d 321 (1971).

Oklahoma: Okla. Stat. Ann. §1753 (1965).

(Cont'd.)

can be little doubt as to which party ought more equitably to bear the loss.[12] This factor was explicitly recognized in the court below:

> . . . Despite the best efforts of those in authority, policemen will at times use excessive force or attack people without lawful cause. Those wronged are not wronged by the policemen alone or even chiefly, and not by the supervisor merely because he has failed to give

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Ftn. 11 (Cont'd.)
Oregon: *Ore. Rev. Stat.* §30.260 *et seq.* (1967).
Rhode Island: *Becker v. Beaudoin*, 261 A.2d 896 (R.I. 1970).
Virginia: Va. Code Ann. §8-42.1 (1970); *Markham v. Newport News*, 292 F.2d 711 (4th Cir. 1961).
Washington: Wash Rev. Code §4.92.010-4.96.020 (1970).
Wisconsin: *Holytz v. Milwaukee*, 17 Wis. 2d 26, 115 N.W.2d 618 (1962).

In the following, states and municipalities may be liable for the torts of their officials to the extent that the municipalities have insurance:

Delaware: *Del. Code Ann.* title 18 §6509 (1971 Supp.).
Idaho: Idaho Code Ann. §41-3505 (1961).
Missouri: Mo. Stat. Ann. §71.185 (1970).
Montana: Mont. Rev. Code title 83 Ch. 7, 83-701 (1961).
New Hampshire: N.H. Rev. Stat. Ann. §412.3 (1968).
New Mexico: N.M. Stat. Ann. §5-6-20 (1966).
North Dakota: N.D. Cent. Code §40-43-07 (1968).
Vermont: Vt. Stat. Ann. Tit. 29, §1403 (1970).
Wyoming: Wyo. Stat. Ann. §15.1-4 (1965).

12 "Since the policeman is society's servant, his acts in the execution of his duty are attributable to the master or employer." Burger, Chief Justice (then Circuit Judge), "Who Will Watch the Watchmen," 14 Amer. U. L. R. 1, 14 (1964).

> the very best training and instruction. It is the municipality which employs the policemen, because it knows of no other way to hold the forces of evil in check, and has failed to diminish them or remove the causes that bring them into being, with any real effectiveness. Thus it appears very unjust for a citizen, injured in such an encounter, to have to look for redress only to a patrolman who maybe cannot even be served with process, like Carlson here, or is judgment-proof. It is not much more satisfactory if he can sue supervisory officials who most likely were doing everything possible according to their lights to avert the evil that occurred. The municipality which arms and uniforms an untrained person and puts him on the streets without need, in anything short of a desperate emergency, has committed a grievious wrong. C.A. p. 30a (concurring opinion of Nichols, J.)

Given the further fact that most victims of police brutality are found in the lower socio-economic strata, it becomes inherently unfair to expect these victims to endure the financial losses which frequently attend police misconduct. Neither can these persons be expected to protect themselves by insurance. Uniform municipal liability for police misconduct would result in spreading the risk of loss so thinly that no citizen would run the hazard of financial disaster.

Justice (then Judge) Cardozo once said, "A right of action is property." *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 110, 120 N.E. 198, 201 (1918). It thus follows that

any arbitrary denial of a right of action is a deprivation of property without due process. While there may be situations in which shielding governments from liability is appropriate in achieving some rational, constitutionally inoffensive goal, presumptive governmental immunity denies due process, which requires instead presumptive government accountability from which lawful exceptions could then be carved.

If governmental conduct results in financial loss to a citizen, the denial of effective legal redress leaves that loss uncompensated, resulting in a taking of property. And again, if the reasons for the denial are capricious, due process requirements have not been met.[13]

Sovereign immunity invidiously discriminates among citizens. It treats differently, with no rational basis for distinction, citizens injured by private conduct from citizens injured by state action. Thus the doctrine is contrary to the Equal Protection and Due Process clauses of the

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13 "The immunity theory has been further supported with the idea that it is better for an individual to suffer a grievious wrong than to impose liability on the people vicariously through their government. If there is anything more than a sham to our constitutional guarantee that the courts shall always be open to redress wrongs and to our sense of justice that there shall be a remedy for every wrong committed, then certainly this basis for the rule cannot be supported." *Hargrove v. Town of Cocoa Beach*, 96 So. 2d 130, 132 (Fla. 1957).

Fourteenth Amendment[14] and the Due Process clause of the Fifth Amendment.[15]

No federal court has ever held that sovereign immunity violated due process. As Mr. Justice Frankfurter observed, however, " 'Due process' is, perhaps the least frozen concept of our law – the least confined to history and the most absorptive of powerful social standards of a progressive society." *Griffin v. Illinois*, 351 U.S. 12, 20-21 (1956).

This Court has on several occasions been responsive to the kinetics of history and experience in illuminating the need for changing previously formulated conceptions of due process. Twenty-one years after *Betts v. Brady*, 316 U.S. 455 (1942), held that due process did not compel the right to counsel in every criminal case, *Gideon v.*

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[14] This was precisely the holding of the Court in *Krause v. State*, 28 Ohio App. 2d 1, 274 N.E.2d 321 (1971). *See, also Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Baker v. Carr*, 369 U.S. 186 (1962).

It is clear that a municipality may not with impunity violate 14th Amendment rights:

> . . . although the forms and functions of local government and the relationships among the various units are matters of state concern, it is now beyond question that a state's political subdivisions must comply with the Fourteenth Amendment. The actions of local government are the actions of the state. A city, town, or county may no more deny the equal protection of the laws than it may abridge freedom of speech, establish an official religion, arrest without probable cause, or deny due process of law. *Avery v. Midland County*, 390 U.S. 474, 480 (1968).

[15] *Bolling v. Sharpe*, 347 U.S. 497 (1954).

Wainwright, 372 U.S. 335 (1963) specifically rejected that holding. *Malloy v. Hogan*, 378 U.S. 1 (1964) overruled *Twining v. New Jersey*, 211 U.S. 78 (1908), holding that the right against self-incrimination was indeed an element of Fourteenth Amendment due process. More recently, in *Benton v. Maryland*, 395 U.S. 784 (1969), this Court finally held that the prohibition against double jeopardy was a necessary element of due process, overruling *Palko v. Connecticut*, 302 U.S. 319 (1937).

Of most significance to this case is the *Mapp v. Ohio*, 367 U.S. 643 (1961) departure from *Wolf v. Colorado*, 338 U.S. 25 (1949). In *Mapp* the Court held that the exclusionary rule delineated in *Weeks v. United States*, 232 U.S. 383 (1914), was encompassed within the Fourteenth Amendment's due process requirements. Analyzing due process conceptions born in *Weeks* and *Mapp* compels the conclusion that sovereign immunity, particularly for police misconduct, runs afoul of those conceptions.

D. Governmental Liability is the Only Effective Method of Compensating For and Deterring Police Misconduct.

In this section respondent will show that (1) police misconduct continues to be a problem of major dimensions, especially in large urban centers; (2) existing procedures and institutions other than municipal civil liability are ineffective in controlling police misconduct; and (3) municipal liability and damages under § 1983 are essential to providing an effective and orderly remedy for police excesses.

1. Police Misconduct Is a Serious Obstacle to Effective Law Enforcement in the United States.

In the same year that Monroe was decided by this Court, the U.S. Civil Rights Commission concluded that "police

brutality is still a serious problem in the United States."[16] There is little reason to believe that the situation has improved.

A study undertaken by the President's Commission on Law Enforcement and the Administration of Justice in 1966 found that physical abuse and excessive use of force by police officers continued to be a significant problem in large metropolitan areas of the country. One arm of the Commission, the President's Task Force on the Police, concluded as follows:

> Although many allegations of police misconduct or discriminatory treatment are unwarranted, the Commission's surveys reveal that police practices exist which cannot be justified. For example, the Commission found that abusive treatment of minority groups and the poor continues to occur. Many established police policies – such as the use of arrests for investigative purposes – alienate the community and have no legal basis. Departments may utilize procedures, such as the use of dogs to control crowds, without balancing the potential harm to police-community relations and some valuable law enforcement techniques, like field interrogation, are frequently abused to the detriment of community relations. Too few departments give necessary guidance to assist their personnel

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16 "The 50 States Report," submitted to the Commission on Civil Rights by the State Advisory Committees, 1961 (Washington, U.S. Government Printing Office, 1961).

> in resolving potentially explosive social and criminal problems . . .
>
> Unjustified use of force, like verbal abuse, cannot be tolerated in law enforcement. Many persons, and particularly those from minority groups believe that police officers sometimes or even frequently engage in excessive or unnecessary physical force. The Commission was not able to determine the extent of physical abuse by policemen in this country since recent studies have generally not been systematic. Earlier studies, however, have found that police brutality was a significant problem. For example, the National Commission on Law Observance and Enforcement (the Wickersham Commission) which reported to President Hoover in 1931, found considerable evidence of police brutality. The President's Commission on Civil Rights, appointed by President Truman made a similar finding in 1947. The President's Task Force on the Police, *supra*, pp. 178-181.

One item of evidence utilized by the President's Task Force on the Police was an 11-month study conducted by the University of Michigan under a grant from the U.S. Department of Justice. The 1965 study was an attempt to estimate the amount of police mistreatment by actual observation of police contact with citizens. Some of the questions the study was designed to answer were: How widespread is police misconduct, and is it on the rise? Why do policemen mistreat citizens? To find some answers, 36 investigators for the Center of Research on Social

Organization observed police-citizen encounters in Boston, Chicago, and Washington, D.C. The investigators accompanied police officers on routine patrols over a period of several months. The results of the study indicated that 27% of the police operating in the ghetto sections of these three cities were seen or admitted to engaging in misconduct of one kind or another. The study's conclusion would also suggest that physical brutality is frequent. The Commission's task force observers accompanying police observed 20 acts of clear brutality during 850 8-hour patrols. President's Task Force on the Police, *supra*, p. 182.[17]

The President's Task Force also found arrests for harassment to be prevalent in many areas, citing studies conducted in Detroit and Cleveland which found the practice of arrests without probable cause to keep "undesirable"

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[17] See, A Police Department In Trouble: Racial Discrimination and Misconduct in the Police Department of Washington, D.C. (report and recommendations of the National Capital Area Civil Liberties Union, August 1, 1968) (hereinafter referred to as NCACLU Report). The NCACLU Report indicates the significance of this statistic by computing that in Washington, D.C. with a police force at the time of the report of 2800 men, there are 700-800 8-hr. patrols per day. By projecting the figures, one arrives at a total of 15 acts of brutality every day, or over 5,000 per year. The size of the police force has almost doubled since then. "It must also be kept in mind that these acts of unwarranted and excessive violence were committed by the police while they knew they were under observation by Crime Commission investigators and it may be assumed that they exercised more restraint than they would have exercised if they had not been under observation." NCACLU Report, p. 9.

persons off the streets to be prevalent in certain areas of activity (gambling, prostitution, etc.).[18]

A recent suit in the District of Columbia revealed that the Metropolitan Police engaged in a pattern of arresting and detaining underground newspaper vendors without legal authority, in violation of their First Amendment rights. *Washington Free Community, Inc. v. Wilson*, No. 71-2008, (presently pending in the United States Court of Appeals for the District of Columbia Circuit). The evidence at trial from 18 witnesses indicated approximately 750 instances of vendor harassment over a three-year period.

It is perhaps appropriate to conclude this section on police misconduct with the observation of one writer on the effects of official lawlessness:

> More and more citizens are coming to disbelieve the promise of justice and are turning to violent dissent, advocacy of unconstitutional repression or mindless lawlessness. They no longer believe that the system will

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[18] Task Force on the Police, *supra*, p. 186. *Cf. Smith v. Florida*, 40 U.S.L. Week 4221 (U.S. Feb. 22, 1972); *Papachristou v. City of Jacksonville*, 40 U.S.L. Week 4216 (U.S. Feb. 22, 1972); *Ricks v. District of Columbia*, 134 U.S. App. D.C. 201, 414 F.2d 1097 (1968); *Gomez v. Wilson*, 139 U.S. App. D.C. 122, 430 F.2d 495 (1970); *Gomez v. Layton*, 129 U.S. App. D.C. 289, 394 F.2d 764 (1968).

"Frequent instances of arrests, many unjustified, under the 'failure to move on' provision of the disorderly conduct statute have resulted from a lack of understanding on the part of both citizens and officers as to when this provision may properly be invoked." *Report of the President's Commission on Crime in the District of Columbia*, p. 208 (1966).

eventually work for them. They no longer have faith in the rule of law.[19]

2. Existing Procedures and Institutions for Controlling Policemen's Conduct Are Ineffective.

Although police brutality and misconduct have existed for decades, no adequate official response has been forthcoming. While internal and external controls have been attempted, the current approaches neither work nor show promise of working.

Ideally, of course, the best way to deal with police misconduct is to prevent it from happening initially through the use of effective methods of personnel screening, sufficient training, constant retraining, and supervision. But, failing that,[20] the question becomes how complaints should be handled.

a. Internal Review.

Most large police departments now have procedures of some kind which are supposed to deal with charges of

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19 Downie, *Justice Denied: The Case for Reform of the Courts*, p. 18 (Praeger 1971).

20 "The basic training of a policeman is rarely adequate to make him understand what he can and cannot do in all situations; it is unlikely that without some special effort and outside help he will ever understand what he did wrong in a given case." Mr. Chief Justice (then Circuit Judge) Burger, "Who Will Watch the Watchmen," 14 Amer. U. L. Rev. 1, 11 (1964). "But no effective mechanisms of communication to inform and educate police exist in any real sense in metropolitan police departments." *Id.* at 12.

misconduct by their members, whether those charges originate inside or outside of the department. Internal investigations, conducted properly, can provide important information about the conduct of individual officers. At p. 194, the President's Task Force on the Police notes:

> The internal investigation units should be just as diligent in sampling the conduct of its officers and ferreting out misconduct against citizens as in ferreting out corruption. For example, they should be willing to observe police conduct on the street, to have men in station houses to determine whether physical abuse occurs, and to utilize other promising investigative techniques . . .
>
> Policemen all too often, because of misplaced loyalty, overlook serious misconduct by other officers. This has relevance to community relations as well as corruption. The Michigan State survey indicates that there is seldom any established procedure to accommodate the complaint of one officer against another and that 'nearly every organization contacted made it extremely difficult to inform higher officials of improper conduct on the part of his fellow officers or his supervisors.

Studies of the informal codes within police departments cast considerable doubt on the effectiveness of internal investigation involving the complaint by one officer of improper performance of duties by another officer.[21]

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[21] The research conducted by Professor Albert Reiss for the Task Force on the Police showed that in more than one-half of all instances

(Cont'd)

b. Citizen Complaints.

The President's Task Force on the Police reported that the police actively discourage the filing of citizens' complaints and retaliate against complainants.

> Although some departments have recognized the vital role that a good complaint procedure can play in police administration, too few forces today have adequate procedures for dealing with complaints. . . . Although some of the reasons for distrust are unjustified,

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Fin. 21 (Cont'd.)
of undue force, at least one other policeman was present who did not participate in the use of force but who also did not report it. The study showed that "for the most part, the police do not restrain their fellow policemen. On the contrary, there were times when their very presence encouraged the use of force." Reiss, "Police Brutality – Answers to Key Questions." *Transaction*, p. 18 (July/August 1968). Professor of Sociology Ellwyn R. Stoddard contends that illegal practices of police personnel are socially prescribed and patterned through the informal "code" rather than being a function of individual aberration or personal inadequacies of the policemen. He cites as an example the use of "illegal" violence by policemen, which is justified as a necessary means to locate and harass criminals. These procedures are reinforced through coordinated group action.

> "The officer needs the support of his fellow officers in dangerous situations and when he resorts to practices of questionable legality. Therefore, the rookie must pass the test of loyalty to the code of secrecy. Sometimes his loyalty to colleagues has the effect of protecting the law violating, unethical officer." Stoddard, 59 *J. Crim. L., C. & P.S.*, 138, 143 (1968).

there is a basis for the feeling that many departments have adopted procedures which discourage rather than encourage the filing of complaints and which are unfair either to the complainant or to the officer complained against. Unfortunately, police officers and departments often regard a citizen complaint as an attack on the police as a whole rather than a complaint against an individual officer, and therefore, attempt to discourage citizens from filing them. The discouraging of citizen complaints not only deprives the department of valuable information, but also convinces the public that the kinds of practices complained about are condoned or even expected.

Several methods of discouraging complaints have been practiced in the past. In one large eastern city, for example, [Washington, D.C.] the police department used to charge many of those who filed complaints of police misconduct with filing false reports with the police. In 1962, 16 of 41 persons (almost 40%) who filed complaints were arrested for filing false charges, in comparison with the arrest of only 104 of 33,593 persons (0.3%) who filed similar charges against private citizens. Officers sometimes told prospective complainants that all statements must be made under oath and that they could be charged with false reporting. Such a statement is apt to discourage complaints whether or not such charges are actually filed. Task Force on the Police, *supra*, pp. 194-195.

Furthermore, once a citizen makes an effort to complain, the mechanics of receiving complaints often tend to discourage a potential complainant from taking any action. Some police departments employ procedures which are so fragmented or complex, that the ordinary citizen either gives up or never tries in the first place. On the other hand, other departments employ procedures which are completely haphazard. The Task Force Report disclosed the surprising fact that 75% of police departments have no formal complaint requirements at all (The President's Task Force on the Police, *supra*, p. 195).

The President's Task Force Report discloses survey results showing that although 90% of the police departments surveyed require an investigation of all citizen complaints, many forces do not have a designated special unit for doing so.[22] The existence of such a unit, however, is no guarantee of efficient, objective investigations of complaints. The NCACLU Report disclosed that the Metropolitan Police Department's Internal Investigations Division took between 3-6 months to investigate a case and report to the Chief of Police. It also found that the investigations were extremely biased in favor of the accused officer. The investigative reports generally accepted the version given by the accused police officers and other police witnesses. The NCACLU Report concluded that no system for processing citizens' complaints against the

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[22] The surveys found that in departments without internal investigations units, where investigations were conducted by the line unit involved, they were often haphazard and dependent on the particular line commander; an independent objective investigation was more difficult to obtain, and even if this was accomplished, suspicion of the result was more likely. The President's Task Force on the Police, *supra*, at 195-196.

police could be satisfactory as long as it depended upon the investigation being conducted by the police department itself.[23]

The survey findings disclosed by the report of the President's Task Force on the Police provide little hope of fair and impartial resolution of complaints. The number of complaints sustained compared to the number originally filed is amzingly low.[24]

> Police complaint investigative procedures in most departments must be substantially improved to obtain results which are just to all the parties and give the appearance of fairness. At present, the procedures in most departments have many deficiencies. For example, a study by the Harvard Law Review in 1963 found that 70% of police departments surveyed had no formal hearings even for serious complaints; almost half with hearings held them in secret; the complainant could not examine witnesses in 20%; he was entitled to the department's investigative

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[23] NCACLU Report, p. 16.

[24] The President's Task Force on the Police, *supra*, at 196. The NCACLU Report also found the police trial board to be the weakest link in the chain of processing complaints against the police. The Report concluded that "whatever the other deficiencies in the system, the most glaring abuse is that perpetrated by the trial boards. The record of these boards in Washington, D.C. shows almost consistent cover-up or minimizing of police abuses, and a pattern of discrimination against Negro police officers brought before trial boards on internal disciplinary matters." NCACLU Report, p. 16.

> report in only 5%; and in 20%, the complainant and officer were not entitled to the assistance of counsel. The Michigan State survey found that the trial board in one city is ineffective because of the lack of subpoena power; that in many cities the secrecy of trial boards leads to public distrust; that the denial to complainants of a right to a hearing or, if one is held, to present witnesses or to testify themselves, produces charges of unfairness; and that organizational and procedural complexity, the lack of information given to the public, and lack of supervision of police personnel discourages many complaints.
> The President's Task Force on the Police, *supra*, p. 196.

c. External Avenues of Redress.

In all jurisdictions, if a complainant remains dissatisfied with the internal disposition of a case, there are other avenues to pursue his claim outside the police agency, *i.e.*, the local prosecutor, the courts, civilian review boards, etc. The President's Task Force on the Police found that, while the institutions listed above have procedures for processing citizen grievances about the conduct of police officers, they are frequently too formal, awesome, expensive, or geographically far-removed from the often bewildered citizen. Task Force Report, p. 198. Furthermore, some of them lack the machinery or resources to process grievances properly.

i) Criminal Law.

The relevance of the criminal law to police-community relations is limited by many factors. The Task Force on the Police found that many prosecutors are reluctant to bring charges except in the most serious and irrefutable cases because they work so closely with the police. Even apart from criminal prosecutions of police, the criminal law could play a significant part in police discipline since frequently criminal prosecutions of non-police defendants result in findings of police misconduct justifying suppression. Rarely does such a finding provoke disciplinary action against the police officer.[26]

ii) Civilian Review Boards.

As the result of citizen dissatisfaction with police internal review porcedures, civil review boards were created in several large cities. While the boards which have gone into operation differ somewhat in organization and detail, their basic concept has been the same. They have been advisory only, having no power to decide cases. The President's Task Force Report noted that the boards of

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[25] The President's Task Force on the Police Report, p. 198. The NCACLU Report of 1968 reported that the Office of the U.S. Attorney has, with rare exception, failed and refused vigorously to prosecute police officers in the District of Columbia against whom there was clear evidence of serious crime. NCACLU Report, p. 22.

[26] "I am informed by experts that a policeman is rarely disciplined for action declared illegal by a court as a basis for suppression." Burger, Chief Justice, then Circuit Judge, "Who Will Watch the Watchmen," 14 Amer. U.L. Rev. 1, 11 (1964).

New York City and Washington, D.C. even lacked the power to indicate their views on the merits of the case under consideration, being limited to recommending whether a police trial was necessary or not. The President's Task Force on the Police, p. 200.[27] The President's Task Force found that civilian review boards have many of the same weaknesses which exist in internal police machinery in many departments.[28] Many problems were found to be due to a lack of staff and delays in receiving reports from police departments. Citizens have had difficulty in obtaining complaint forms, the procedures of the boards have not been widely known, and the boards have been slow in their determination of cases.[29]

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[27] With reference to the complaint review board of Washington, D.C., it is noted that the Board only comes into play when the Chief of Police makes an initial decision that a citizen complaint does not merit administrative prosecution. (NCACLU Report of 1968, p. 9). If the Chief decides that the complaint does merit prosecution, he sends the case directly to a trial board, and the complaint review board never comes into operation. A serious defect of the Washington board, as reported by the study, was that there was no independent investigative staff, the board relying solely on the investigative file provided by the police department.

[28] The potential advantages and weaknesses inherent in civilian review boards have been the subject of considerable legal scholarship, *e.g.*, Goldstein, "Administrative Problems in Controlling the Exercise of Police Authority," 58 J. Crim. L., C. & P.S. 160 (1967); Locke, "Police Brutality and Civilian Review Boards," 44 J. Urban L. Rev., "2 Crim. L. Bull. 3 (October, 1966); Neier, "Civilian Review Boards – Another View," 2 Crim. L. Bull. 10 (October, 1966); Packer, "The Courts, the Police, and the Rest of Us," 57 J. Crim. L., C. & P.S. 238 (September, 1966).

[29] The President's Task Force on the Police, *supra*, p. 201.

iii) Tort Liability of Individual Law Officers.

Although damages are, at present, theoretically recoverable against individual police officers under §1983, the remedy is of dubious value due to the frequent uncollectability of such judgments.[30] The predictable result of suing judgment-proof defendants is to discourage private practitioners from taking such cases, and thereby, as a practical matter, foreclosing the claim before it ever gets into court.[31]

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[30] The penuriousness of policemen has attracted judicial notice.

> There can be little doubt that actions for money damages would not suffice to repair the injury suffered by the victims of the police searches . . . [enjoined in this §1983 action] . . . Neither the personal assets of the policemen nor the nominal bonds they furnish afford genuine hope for redress. *Lankford v. Gelston*, 364 F.2d 197, 202 (4th Cir. 1966); *Mapp v. Ohio*, 367 U.S. 643, 670 (1961); *see*, Foote, "Tort Remedies for Police Violations of Individual Rights," 39 Minn. L. Rev. 493 (1955); Hall, "The Law of Arrest in Relation to Contemporary Social Problems," 3 Univ. of Chicago L. Rev. 345, 346-353 (1936). Another possible problem is exemplified by the instant case, where the potentially transitory individual officer cannot even be found for service.

[31] The United States Commission on Civil Rights recognized this problem as follows:

> The Commission . . . recommends that Congress consider amending §1983 to provide that in all actions brought under this Section – actions for injunctions, as well as for damages – the court, in its discretion, may allow the prevailing party reasonable attorney's fees as part of the costs.
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> *United States Commission on Civil Rights, Law Enforcement: A Report on Equal Protection in the South*, 179-180 (1965).

3. Municipal Liability Under Section 1983 Offers An Effective and Equitable Means of Compensating Victims of Police Misconduct.

Most of the scholars and other commentators who have addressed themselves to the question have concluded that municipal liability in damages constitutes a powerful incentive to the deterrence of police misconduct.[32] The effectiveness of the financial deterrent is essential to motivate police administrative and supervisory personnel to control the conduct of lower echelon officers. The President's Commission found that the capacity to control police conduct is considerable...

> The police administrator currently achieves a high degree of conformity on the part of officers to standards governing such matters as the form of dress, the method of completing reports, and the procedures for processing of citizen complaints. Sleeping on duty, leaving one's place of assignment without authorization, or failing to meet one's financial obligations are all situations against which supervisory personnel currently take effective action.[33]

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[32] Chafee, "Safeguarding Fundamental Human Rights: The Tasks of States and Nations," 27 Geo. Wash. L. Rev. 519 (1959); Foote, "Tort Remedies for Police Violations of Individual Rights," 39 Minn. L. Rev. 493, 514 (1955); Smith, "Municipal Tort Liability," 48 Mich. L. Rev. 41, 50-51 (1949); Note, "Philadelphia Police Practice and the Law of Arrest," 100 Univ. Pa. L. Rev. 1182 (1952); Note, "Grievance Response Mechanisms for Police Misconduct," 55 Va. L. Rev. 909 (1969).

[33] The President's Task Force on the Police, *supra*, p. 29.

The success of internal controls as applied to such matters appears to depend upon two major factors: (1) the attitude and commitment of the head of the agency to the policies being enforced, and (2) the degree to which individual officers, and especially supervisory officers, have a desire to conform.

The average police administrator, for example, has no ambivalence over accepting responsibility for the physical appearance of his men.

> He does not wait to act until complaints are received from a third party. He undertakes, instead, by a variety of administrative techniques, to produce a desire in his subordinates to conform. This desire may reflect in agreement by the subordinates with the policy. Or it may reflect respect for their superior, a lack of interest one way or the other, or a fear of punishment or reprisal. Whatever the reason, the officer in a sort of 'state of command' does what he is told rather than follow a course of his own choosing . . .
>
> Some of the problems of achieving control over the conduct of individual police officers would be simplified if there were a commitment by the police administrator to a systematic policy formulation process. This would require specific attention to present unarticulated policies which are clearly illegal and as a consequence would create administrative pressure to reject them or develop alternatives rather than assume the indefensible position of formally adopting illegal practices

> as official departmental policy. *Task Force on the Police*, p. 29.

The root of the problem of police misconduct lies not so much in the aberrant behavior or personality of the patrolman on the street, but rather in the attitude and policies of the officials who run the department. Municipal exposure to liability cannot for long be a matter of indifference to top level police administrators, and their concern can readily be translated into modification of the patrolman's practices.

Justice Traynor said of the immunity doctrine in *Muskopf v. Corning Hospital Dist.*, 359 P. 2d at 460:

> "None of the reasons for its continuance can withstand analysis. No one defends total governmental immunity. In fact it does not exist. It has become riddled with exceptions, both legislative . . . and judicial. . . . and the exceptions operate so illogically as to cause serious inequality. Some who are injured by governmental agencies can recover, others cannot . . .

While the instant case comes within clearly recognized exceptions thereto, it is time to finally lay the doctrine to rest on appropriate constitutional grounds, especially in cases involving police misconduct. This is the only fair way to achieve the goal of uniformity so vigorously pressed by petitioner.

II. THE RATIONALE OF *MONROE* IS INAPPLICABLE TO MUNICIPALITIES WHICH ARE NOT IMMUNE UNDER LOCAL LAW.

Respondent has urged, at pp. 4-11, *supra*, that the *Monroe* holding excluding cities from suits under §1983 is in need of re-examination, and that relevant considerations of legislative history, public policy and constitutional requirements should lead to a different result. Should the Court decline to re-examine *Monroe* at this time, however, the decision of the circuit court should nevertheless be affirmed, since *Monroe* is clearly distinguishable.

Whatever force the Sherman Amendment debate may have with regard to not imposing additional liability on municipalities under Section 1983 is lost where the conduct complained of would subject municipalities to liability under state law. Thus, there is no inconsistency between upholding Chicago's immunity, as this Court did in *Monroe*, and recognizing the liability of the District of Columbia, as the Circuit Court did in this case. Under Illinois law, Chicago was immune for the intentional torts of its employees (Illinois Rev. Stat. ch. 24 §§1-15 (1959)). The District of Columbia, on the other hand, is clearly liable for such torts apart from Section 1983.[34]

The above distinction was recognized by opponents to the Sherman Amendment. Representative Poland spoke directly to this issue:

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[34] *See*, pp. 45-6, *infra*.

> I presume, too, that had a state imposed a duty upon such municipality, and provided they should be liable for any damages caused by failure to perform such duty, that an action would be allowed to be maintained against them in the courts of the United States . . . . But the enforcing of a liability, existing by their own contract, or by state law is a very widely different thing from devolving a new duty or liability upon them by the national government, which has no power either to create or destroy them and no power or control over them whatever. *Cong. Globe* at 794; see, also, *Cong. Globe* at 795 (remarks of Rep. Burchard).

In the same vein, Representative Burchard recognized that:

> . . . so far as the cities are concerned, where the equal protection required to be afforded by a State is imposed upon a city by state laws, the United States could enforce its performance . . . [by an award of damages]. *Cong. Globe* at 795.

This legislative history supports the conclusion of the court below that

> the intent of Congress was not to create municipal immunity, but to defer to the immunity that existed under local common law. Where local law has abolished or narrowed the scope of municipal immunity, the scope of immunity under §1983 should follow the local rule (C.A. p. 20a).

The same conclusion has been reached by the various treatise-writers who have addressed themselves to the matter,[35] and as has been shown, it is supported by highly compelling considerations of public policy.[36]

Further support may be found in an analysis of the underlying purpose of the Civil Rights Act itself as discerned by Mr. Justice Douglas in *Monroe:*

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies.
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[35] *Kates and Kouba, supra*, n. 2 pp. 157-161; 55 Minn. L. Rev. 1201 at 134-136; A. Van Alstyne, *California Government Tort Liability* §7.8 (1964): "*Monroe* seems to exclude public entities from the purview of the Federal Civil Rights Act for the reason that (and thus perhaps, only to the extent that) traditional concepts of sovereign immunity as recognized by state law were intended to be left undisturbed by Congress. To the extent that state law, as in California, admits liability of public entities for the torts of their employees, the reasons for limiting the application of §1983 to public employees no longer are persuasive."; Comment, "Suing Public Entities Under the Federal Civil Rights Act: *Monroe v. Pape Reconsidered*," 43 U. Col. L.R. 105 (1971).

[36] See, pp. 18-35, *supra*.

> It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. 365 U.S. 167, 180, 183 (1961).

In light of these observations it would be anomalous indeed to conclude that Congress intended to confront complainants with the dilemma of having to choose between a preferable federal forum[37] and a more effective state remedy. That Congress had no such intent is clearly evidenced by 42 U.S.C. §1988.

A. The Local Rule of Municipal Liability is Incorporated into Section 1983 by Section 1988.

As the Court of Appeals duly noted, (C.A. at 21a) the propriety of imposing liability upon municipal corporations which have abolished or modified municipal immunity

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[37] The independence which arises from the lifetime tenure of federal judges and which was obviously focal in the passage of the 1871 Civil Rights legislation is a benefit unknown to many, if not most state court judges. In the District of Columbia, Superior Court judges are appointed for 15-year terms and are removable by the Commission on Judicial Disabilities and Tenure, D.C. Code, §§11-1502, 26.

Petitioner suggests that if the Court of Appeals ruling in this case is permitted to stand, complainants will be induced to seek redress in District Court. Apparently petitioner is suggesting the spurious notion that encouraging litigants to sue in federal court is inconsistent with §1983.

under local law is strongly implied, if not directly mandated by §1988.[38]

In §1988, Congress provided, in vindicating federally protected civil rights, that where federal laws are "suitable to carry the same into effect" but are "not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law" then "the common law, as modified and changed by the constitution and statutes of the state" in which the federal court is sitting "so far as the same is not inconsistent with the Constitution and laws of the United States" are to "be extended to and govern . . . the trial and disposition" of the case.[39]

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[38] While it is true that the complaint does not specifically rely upon §1988, this does not bar consideration of that statute in determining respondent's rights under §1983. *Brazier v. Cherry*, 293 F.2d 401 (objection to consideration of §1988 under similar circumstances by dissenting judge impliedly rejected by majority); cf., *Conley v. Gibson*, 355 U.S. 41, 45-48 (1957).

[39] The full text of 42 U.S.C. §1988 is as follows:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protections of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having

(Cont'd.)

In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 240 (1969), Justice Douglas' opinion for the Court recognized the propriety of resorting to a state rule on damages to implement the rights conferred by §1982, citing *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961).

Brazier was a claim under §§1981, 1983 and 1985(3) for damages for police brutality resulting in the death of the plaintiff's husband. Although no provision of the Civil Rights Act expressly provides for survival of an action for personal injury, the court looked to state law and "borrowed" Georgia's wrongful death statute in order to provide a "suitable remedy" for the violation of §1983. The language of the court is equally applicable to the present case, wherein respondent seeks to "borrow" the local law of municipal liability for the actions of a police officer.

> Indeed, §1988 uses sweeping language. It reflects a purpose on the part of Congress that the redress available will effectuate the broad policies of the civil rights statutes. If the federal law is 'suitable to carry the [policy] into effect' resort to local law is not required. On our analysis federal law is not suitable, *i.e.*, sufficient, since it leaves

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Ptn. 39 (Cont'd.)
jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty (R.S. §722).

a gap for death in a substantive policy making no distinction between violent injuries and violent death. Since the federal statutory framework is, in the words of the statute, 'deficient in the provisions necessary to furnish suitable remedies and punish offenses against' that law and policy, the state law is to be used to the extent that it is currently available to overcome these deficiencies.

The term 'suitable remedies' had a deeper meaning. Used, as it was in parallel with the phrase 'and punish offenses against law,' it comprehends those facilities available in local state law but unavailable in federal legislation, which will permit the full effectual enforcement of the policy sought to be achieved by the statutes.

. . . .

From a federal standpoint the only limitation upon the use of such adoptive state legislation, rule or decision is that it is suitable to carry the law into effect because other available direct federal legislation is not adapted to that object or is deficient in furnishing a fully effective redress. *Thus §1988 declares a simple, direct, abbreviated test: what is needed in the particular case under scrutiny to make the civil rights statutes fully effective? The answer to that inquiry is then matched against (a) federal law and if it is found wanting the court must look to (b) state law currently in effect. To whatever extent (b) helps, it is*

> *automatically available, not because it is procedure rather than substance, but because Congress says so.*

Ibid., 293 F.2d at 408-9 (emphasis added).

The *Brazier* test for the applicability of Section 1988, cited with approval in *Sullivan*, compels relief against the District of Columbia under Section 1983. If it is proper for a federal court to incorporate the state rule on damages and survival of actions to shape the federal remedy under the federal statute, it is no less appropriate to adopt a local law on municipal liability for the same purpose.

The message from the legislative history and judicial decisions is clear; relief under the federal Civil Rights Act is to be no less effective than relief under state law. Great violence is done that notion if respondent could sue the city in the state courts under the jurisdiction's local law, but is limited in the federal courts to pursuing the usually judgment-proof police officer under the federal statute.[40]

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[40] Of course, under the doctrine of pendent jurisdiction the state claim against the city could be heard in the federal court together with the §1983 claim against the police officer. Both claims are derived from "a common nucleus of operative fact" and the claims are such that the plaintiff would "ordinarily be expected to try them all in one judicial proceeding" *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966). The doctrine of pendent jurisdiction was used to embrace "extra" non-federal parties in *Wilson v. American Chain & Cable Co.*, 364 F.2d 558 (3rd Cir. 1966) and *Jacobson v. Atlantic City Hospital*, 392 F.2d 149 (3rd Cir. 1968); *cf.*, *Putnum v. City of Greensburg*, 419 F.2d 1300 (6th Cir. 1969), *cert. den.*, 397 U.S. 990 (1970).

Contrary to petitioner's contention on this point, there is nothing inconsistent with the rationale of *Monroe* in adopting the local law on municipal liability. In *Monroe*, the court had no occasion to consider the question of liability under §1988 of a municipal corporation which at pp. 4-8, *supra*, the entire thrust of the Sherman did possess such immunity. Indeed, as has been discussed at pp. , *supra*, the entire thrust of the Sherman Amendment debate was simply to avoid the imposition of a duty, and consequent liability for violating that duty, upon a governmental entity which would otherwise have no such liability – a consideration totally irrelevant to the present situation.[41] Accordingly, we read *Monroe* as holding no more than that there can be no municipal liability inconsistent with local law, and therefore not dispositive of the question in those states permitting actions against municipalities.[42]

The District of Columbia objects that incorporating the local law of a particular state on the question of municipal immunity runs counter to the general notion of uniformity of federal law. What appellant fails to recognize,

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[41] *Brown v. Town of Caliente*, 392 F.2d 546 (9th Cir. 1968), cited by petitioner, is similarly inapposite, since §1988 was not cited to the court, and no consideration was given to its potential remedial role.

[42] The propriety of incorporating local law on municipal liability under §1988 to afford a remedy under §1983 was recognized in *Sostre v. Rockefeller*, 312 F. Supp. 863 (S.D. N.Y. 1970). A similar approach was used to find liability under §1981 in *U.S. ex rel Washington v. Chester County Police Department*, 294 F. Supp. 1157 (E.D. Pa. 1969); *cf.*, "Developing Governmental Liability Under 42 U.S.C. §1983," 55 Minn. L. Rev. 1201, 1214-1222.

however, is that lack of uniformity is necessarily implied in §1988. By its very terms, §1988 " . . . provides for the use of state law as a supplement to the remedial powers of federal district courts." *Baker v. F. & F. Investment*, 420 F.2d 1191, 96 (7th Cir. 1970). Section 1988 reflects a congressional willingness to sacrifice uniformity, if necessary, for the goal of a fully effective federal remedy.

B. The Common Law of the District of Columbia Permits Suits Against the Municipality Arising From the Tortious Misconduct of Its Police Officers.

The gradual but relentless demise of the doctrine of sovereign immunity in the District of Columbia over the past decade has been traced by the U.S. Court of Appeals for the District of Columbia, sitting *en banc* in *Spencer v. General Hospital of the District of Columbia*, 138 U.S. App. D.C. 48, 425 F.2d 479 (1969). In *Elgin v. District of Columbia*, 119 U.S. App. D.C., 116, 337 F.2d 152 (1964) the once-hallowed "governmental/proprietary" distinction was finally laid to rest, and the far more flexible "ministerial-discretionary" dichotomy was erected in its place.[43] The movement toward expanding municipal liability signaled by *Elgin* was noted and approved in the opinion of the court and the concurring

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[43] One noted commentator has described *Elgin* as representing " . . . as complete an abolition of the doctrine of sovereign immunity from tort liability as any judicial opinion that has been written by any of the state courts that have abolished that doctrine." Davis, 3 Administrative Law T., §25.01 at p. 107 (1965 Pocket Part).

opinions in *Spencer*, wherein the District was held answerable for the malpractice of employees at the District of Columbia General Hospital. In a resounding reaffirmation of the liberalized rules set forth in *Elgin*, the court placed itself squarely in the camp of those jurisdictions which have judicially abrogated sovereign immunity,[44] one member noting that "few doctrines in the law have sustained such voluminous, searching and nearly unanimous attack as the principle that governments should not respond in damages for their torts." *Spencer*, 425 F.2d at 485 (concurring opinion of Judge Wright). The decision of the court below, reaffirming *Spencer* and holding that the District may be liable directly, as well as vicariously, for the acts of its policemen, is thus merely the most recent in an unbroken chain of decisions progressively abandoning the widely discredited immunity doctrine.[45] It is thus clear that implementation of §1988 renders the District liable for at least the ministerial acts of its employees.

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[44] See n. 11, *supra*.

[45] The specific application of the *Elgin/Spencer* formula to a police brutality situation had been foreshadowed in *Thomas v. Johnson*, 295 F. Supp. 1025 (D. D.C., 1968) holding that the District of Columbia is under a duty to properly train, control and supervise its police officers. The *Carter* holding has recently been followed by the District of Columbia Court of Appeals in *Graves v. District of Columbia* (D.C. App. No. 5086, February 17, 1972) 287 A.2d 524 (petition for rehearing *en banc* granted April 3, 1972).

III. THE ARGUMENTS RAISED IN OPPOSITION TO THE SHERMAN AMENDMENT ARE INAPPLICABLE TO THE DISTRICT OF COLUMBIA, WHICH IS AN INSTRUMENTALITY OF THE FEDERAL GOVERNMENT.

A basic criticism of the Sherman Amendment was that it would in effect have violated the then generally held constitutional premise that Congress could not impose a tax upon the states. *Cong. Globe*, 756-757, 759, 762, 764 (remarks of Sen. Conkling, Trumbull, Stevenson and Davis). This criticism, to the extent that it reflected attempted constitutional analysis rather than rhetorical flourish, proceeded on the metaphysical reasoning that Congress would be "imposing" taxes upon municipalities by forcing the muncipalities to levy taxes to meet the cost of liabilities incurred under the Sherman Amendment.

Such arguments, rooted in late 19th century notions of highly restricted federal powers, have no applicability where, as here, the District of Columbia is involved. Congress possesses broad legislative authority over the District of Columbia (Constitution, Article I, Section 8, Clause 17), extending not merely to national affairs, but to all matters of funding and other legislation. *Berman v. Parker*, 348 U.S. 26 (1954); *District of Columbia v. John R. Thomason Co.*, 346 U.S. 100 (1953); *Neild v. District of Columbia*, 71 App. D.C., 306, 110 F.2d 246 (1940). Indeed, the specific power of Congress to impose taxes upon the District of Columbia was noted in the debate over the Sherman Amendment. *Cong. Globe* at 799 (remarks of Rep. Smith). Thus, whatever inhibitions the rejection of the Sherman Amendment may reflect as to the power Congress felt it has in imposing duties on state instrumentalities, there could not have been any doubt as to the

power of Congress to impose civil liability on the District of Columbia under §1983.

The role of the "Dictionary Act" of February 25, 1871 in defining the word "person" was noted by this Court in *Monroe*, 365 U.S. at 191. Significantly, only four days earlier, the Congress had created

> a government by the name of the District of Columbia, by which name it is hereby constituted a body corporate for municipal purposes, and may contract and be contracted with, *sue and be sued*, plead and be impleaded, have a seal, and exercise all other powers of a municipal corporation not inconsistent with the Constitution and laws of the United States and the provisions of this act.
> Act of Feb. 21, 1871, 16 Stat. 419, emphasis added).

It is reasonable to infer that on Feb. 25, 1871, Congress was still mindful of what it had done on Feb. 21, and understood and intended that the District was "a body corporate" within the meaning of the word "person." The proximity in time between the two acts is sufficiently compelling to warrant the conclusion that if Congress had intended to exclude the newly-created District from the ranks of "bodies politic and corporate," it would have done so expressly.

The authority to "be sued" constitutes a waiver of whatever immunity to suit might otherwise be thought to exist. *Federal Housing Administration v. Burr*, 309 U.S. 242, 1940. One may well conclude, therefore, that in enacting §1983 Congress intended to include as a "person" subject

to liability the unique municipal corporation which it had created and endowed with "suability" less than two months earlier.

CONCLUSION

For the reasons stated, the judgment of the Circuit Court should be affirmed.

Respectfully submitted,

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